

March 15, 2018

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: NOTICE OF EX PARTE

WT Docket No. 17-79: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment;*

WT Docket No. 15-180: *Revising the Historic Preservation Review Process for Wireless Facility Deployment;*

WC Docket No. 17-84: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*

Dear Ms. Dortch:

On March 13, 2018, Courtney Neville and I of Competitive Carriers Association (“CCA”)¹ met with Louis Peraertz, Senior Legal Advisor, Wireless, International, and Public Safety to Commissioner Mignon Clyburn, to discuss the above referenced proceedings. CCA applauds the Federal Communications Commission’s (“FCC” or “Commission”) work to substantively address barriers to broadband deployment and supports the draft Second Report and Order (“draft Order”) upon which the FCC will vote at its March Open Meeting.² Importantly, CCA emphasizes that reforms contemplated in the draft Order will spur next-generation deployments in rural and urban areas alike. Streamlining the process for historic and environmental review will expedite the siting process and assuage concerns, and confusion, surrounding siting applications, and further deployment of advanced technologies for all consumers.

Rural consumers want the latest technology and services as their urban counterparts. To satiate this demand, competitive carriers need to deploy next-generation technology to unserved and underserved areas, yet often the capital investment necessary to deploy in these low-income and rural areas is too high. For these reasons, CCA supports the draft Order which seeks to provide certainty on application review processes and fees. As CCA has noted on record,³ under the current siting framework, applicants and consulting parties are

¹ CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

² FCC Fact Sheet – Draft Wireless Infrastructure Streamlining Report and Order, WT Docket No. 17-79 (rel. Mar. 1, 2018) (“Draft Order”).

³ Letter from Rebecca Murphy Thompson, EVP & GC, Competitive Carriers Association, WT Docket No. 17-79, WC Docket No. 17-84, WC Docket No. 17-84 at 2-3 (filed Feb. 26, 2018) (“CCA February 26 Letter”) (*noting*, “[f]rom January 2017 until now, the average CCA member deploying in the western United States reports that Tribal interest requests have escalated to an additional three-to-four per site, as compared to one year earlier. What’s more, in just a three-to-six-month timeframe, a Wyoming carrier spends nearly \$20,000 solely in NHPA/NEPA fees for *each* wireless tower deployment. In 2017, this same carrier faced a staggering \$19,550 in Tribal review costs for a new tower in Wyoming, which included Tribal fees from 38 Tribes ranging from \$200 to \$1,500 per Tribe. In 2016, the

typically forced into standoffs regarding increasingly-exorbitant fees before parties ever determine whether or not a Historic Property is present. For example, responding to a Tribe's request, one CCA member in Montana received a Stop Work Order ("SWO") from the FCC in November 2016, which prohibited the company from constructing towers where Tribal authorities had demanded payment to monitor tower construction in the event there was an "unanticipated discovery" of artifacts. As of March 2018, the SWO remains in effect and has stalled deployment of broadband networks in this area of Montana for over 15 months. What's more, the carrier was asked to pay \$500/day per person, and this fee continues to escalate, resulting in about \$250,000 in lost revenue since November 2016 solely for expenses related to site monitors. There also are important public safety and consumer costs as a result of delayed deployment in unserved and underserved areas. In this instance, the carrier is the only provider in this area in Montana; however, as a result of this 15-month delay, the company has been unable to expand service to even smaller towns that lack broadband coverage and therefore lack the most advanced public safety communications, despite investing significant upfront capital. Beyond the financial loss, the current processes are an affront to public safety and consumer benefit in this area of Montana and similar unserved and underserved areas.

Additionally, because small cells and Distributed Antenna Systems ("DAS") are materially different than their macrocell predecessors,⁴ CCA supports the FCC's proposal to clarify that a small wireless facility is not a federal undertaking.⁵ Likewise, the FCC's proposed definition of small cell thoughtfully accounts for the current and future nature of small cells. To ensure providers have sufficient flexibility as equipment and technology standards evolve, however, the Commission should consider tailored modifications to its proposed definition. Specifically, the FCC should remove the enclosure language⁶ and streamline the definition to "...the antenna associated with the deployment should be no more than three cubic feet in volume." Similarly, the Commission should refine its language related to "facilities that are mounted on structures no more than 10 percent taller than other adjacent structures"⁷ to identify a certain geographic area, such as a quarter-mile radius, rather than simply "adjacent structures." Implementing these minor changes will clarify ambiguities and spur broadband deployment for the benefit of all consumers.

CCA also appreciates that the draft Order seeks to assuage confusion for all stakeholders, including governmental entities, by clarifying that paying upfront Tribal fees is not required under the NHPA nor the

same applicant built a similar tower in the same Wyoming town costing \$13,075 in Tribal fees; the jump in Tribal fees from \$13,075 to \$19,550 over one year in the same general deployment area has never been explained.").

⁴ Recent assertions in the record by the cable industry argue that components of a small wireless facility exceed the size of a macrocell. See, Letter from Danielle Pineres, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Mar. 14, 2018). These arguments lack merit and are refuted by ample record evidence. See Letter from Keith Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Mar. 15, 2018) (*noting*, "NCTA provides no support for such an assertion, and it is plainly refuted by the record evidence in this proceeding. As has been described repeatedly, wireless carriers are deploying small cells precisely because they are substantially smaller than macrocells and can be deployed in a significantly less obtrusive manner.").

⁵ See Comments of Competitive Carriers Association, WT Docket No. 17-79, WC Docket No. 17-84, at 18, 25-35 (filed June 15, 2017) ("CCA Comments"). A federal "undertaking" under NHPA includes projects, activities, or programs that "requir[e] a Federal permit, license, or approval[.]" See also, 54 U.S.C. § 300320(3); and 40 CFR § 1508.18(b).

⁶ See Letter from Andre Lachance, Associate General Counsel – Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Mar. 14, 2018).

⁷ Draft Order ¶ 70.

National Programmatic Agreement (“NPA”).⁸ As CCA and others have detailed on record,⁹ Tribal fees and administrative burdens attached to the historic review process have escalated sharply in recent years,¹⁰ and these costs and permitting delays will continue to rise as CCA members deploy to meet consumers’ increasing data demands. For example, one CCA member operating in rural portions of Kansas, Colorado, and Nebraska paid over \$107,000 in initial fees to 36 Tribes for the deployment of just seven towers, in a seven-month period, with no follow-up from any Tribe indicating harm. This is an average of over \$15,000 per tower, solely for Tribal review fees.¹¹ This is not a sustainable arrangement as industry moves toward next generation deployments, especially considering future networks will require denser deployment scenarios. Consumers in rural and remote areas increasingly rely on mobile broadband services to connect with family, obtain telehealth services, and find employment and educational opportunities, and the FCC’s proposed policy reforms appropriately clarify ambiguities to spur broadband deployment for the benefit of all Americans.

But the news is not all bad. In fact, CCA members have worked cooperatively with Tribes and Tribal governments in many instances. For example, one CCA member collaborated with Tribes to deploy a tower site in the remote rural village of Abiquiu, New Mexico. Although the deployment was within one-half mile of previously-identified historic property, the carrier, Tribes, and local SHPO worked together to bring mobile broadband to a previously unserved area without disturbing protected ground. Another CCA member has worked with the Eastern Shoshone and Northern Arapaho Nations of the Wind River Reservation in central Wyoming for years, developing sites on Tribal trust lands to provide critical wireless services to Tribal members in extremely remote locations.¹² These entities also continue to explore other opportunities to jointly work on the development of fiber optic networks to benefit consumers living both on and off Tribal lands. Nevertheless, it’s important to provide the appropriate incentives for both industry and Tribes to help advance the interests of all American consumers.

⁸ See, CCA Comments at 24-25 (explaining that “[n]either the NHPA’s or ACHP implementing rules require payment of Tribal fees nor indicate paying Tribal fees is required to comply with the NHPA; both regulations are silent on that account. As the Commission points out, the ACHP issued guidance regarding fees, first in a memorandum in 2001; this advice was reiterated in ACHP handbooks ever since, most recently in 2012. The ACHP 2001 Fee Guidance explains that “[w]hen the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency’s legal obligation to consult with a tribe under a specific provision of ACHP’s regulations, the agency or applicant is not required to pay the tribe for providing its views,” and that “[i]f the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.” Most importantly, the guidance provides that “[No] portion of the NHPA or the ACHP’s regulations require[s] an agency or an applicant to pay for any form of tribal involvement.”).

⁹ See, Letter from Keith C. Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Feb. 21, 2018); Letter from Henry G. Hultquist, Vice President – Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Feb. 23, 2018); Letter from Tamara Preiss, Vice President – Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Feb. 23, 2018).

¹⁰ See, CCA Comments at 18, 25-35; Competitive Carriers Association, Clearing the Path for America’s Wireless Future - Addressing Hurdles to Meet the Pressing Need for Our Nation’s Wireless Infrastructure (rel. June 8, 2016) (“CCA White Paper”), *available at* <https://ccamobile.org/wp-content/uploads/2017/06/Clearing-the-Path-for-Americas-Wireless-Future-June-2017.pdf>.

¹¹ See, CCA February 26 Letter.

¹² See Letter from Rebecca Murphy Thompson, EVP & GC, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan. 17, 2018) (“CCA ONAP Ex Parte”).

CCA also applauds the FCC's proposal to streamline the review timeline from the current 60-day timeline to a 45-day process for moving forward with construction where Tribal Nations or National Historic Offices ("NHOs") do not respond.¹³ Here again, however, CCA proposes some minor changes to clarify timing. The draft Order notes that the Commission will "promptly contact" the Tribal Nation's or NHO's designated cultural resource representative within 15 calendar days of its interest or lack of interest in participating in the Section 106 review. To further streamline the process, the Commission should clarify the phrase "promptly contact," and tighten the 15-day timeline provided.

CCA likewise applauds the Commission for its extensive Tribal consultation in advance of implementing policy reforms contemplated in the draft Order. While the item describes numerous recent consultations, CCA reiterates that these meetings began long before the release of 2017 NPRM.¹⁴ It is clear that the FCC has followed the principles outlined in the "Statement of Policy Establishing a Government-to-Government Relationship with Indian Tribes,"¹⁵ to consult with Tribal governments.¹⁶

Finally, the Commission should seize this opportunity to conform the excavation component of the "substantial increase in size" definition in the Collocation Agreement with the compound expansion component of the replacement tower exclusion in the 2004 NPA. As stakeholders have explained on record, the "substantial increase in size" definition is triggered for collocations on towers that require excavation anywhere outside of the tower site, while the replacement tower exclusion permits excavation up to thirty feet outside of an existing tower site without the need for Section 106 review.¹⁷ This discrepancy disproportionality affects CCA's vendor members, and other stakeholders deploying tower and collocated equipment.¹⁸ The Commission's good work to streamline mobile broadband deployment processes should not

¹³ Draft Order ¶¶ 103-104.

¹⁴ See, Letter from Scott Bergmann, Senior Vice President – Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Mar. 15, 2018) (*citing*, [f]or example, the wireless industry participated in a two-day meeting hosted by Commission staff at the Isleta Resort and Casino in Albuquerque, New Mexico in January 2016. Wireless industry representatives also participated in a meeting convened at the Commission on November 21, 2016—at which former Chairman Tom Wheeler provided welcoming remarks and urged industry and Tribal representatives to work together in good faith to propose shared general principles for Section 106 reforms within 45 days from the first meeting. Wireless industry representatives, along with Tribal representatives, attended and/or participated via teleconference additional meetings hosted by the Commission on December 6, 2016, December 21, 2016, and January 10, 2017. At the recommendation and organization of Commission staff, wireless industry representatives also discussed principles for reforming the Tribal Consultation Process at the National Congress of American Indians' Executive Council Winter Session on February 15, 2017.").

¹⁵ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement (rel. June 23, 2000) ("Policy Statement").

¹⁶ Among other principles, the Policy Statement provides that the FCC consult with Tribal Nations prior to implementing any regulatory action; endeavor to streamline its administrative process and procedures; welcome submissions from Tribal governments and other concerned parties as to other actions the Commission might take; and incorporate these policy goals into ongoing and long-term planning and management activities, including its policy proposals. See Policy Statement at 4-5.

¹⁷ See, Comments of the Wireless Infrastructure Association, WT Docket No. 17-79 at 72 (filed June 15, 2017).

¹⁸ As an example, a CCA member sought to pursue a 15'x20' expansion on the northeast side of an existing 20'x50' compound in Minnesota, in an already highly-disturbed area of a parking lot. Twenty-seven Tribes wished to consult on the compound expansion, resulting in \$12,750 in Tribal fees. The Tribal consultation process also took a total of 90 days.

be frustrated as a result of discrepancies in existing guidelines. The FCC should take this opportunity to clarify the compound expansion component of the 2004 NPA.

CCA looks forward to continued work with the Commission and industry to streamline and update policies to reflect changes in technology. This *ex parte* notification is being filed electronically with your office pursuant to Section 1.1206 of the Commission's rules. Please do not hesitate to contact me.

Respectfully submitted,

/s/ Rebecca Murphy Thompson

Rebecca Murphy Thompson
EVP & General Counsel
Competitive Carriers Association

cc (via email): Louis Peraertz